



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

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DECISION OF THE BOARD

Mailed and Filed: DECEMBER 23, 2022

IN THE MATTER OF:

Appeal Board No. 608880

PRESENT: RANDALL T. DOUGLAS MEMBER

The Department of Labor issued the initial determinations (including September 17, 2018, December 21, 2018, and May 24, 2019) holding PD Mental Health Counseling of Western Queens PLLC (hereafter "the employer" or "PD") liable for tax contributions in the revised amount of \$28,478.64 for audit period 2015 through 2017 based on unreported payments made to mental health therapists deemed to be in covered employment.

Contending that the individuals included in the audit performed services as independent contractors, the employer requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the employer and of the Commissioner of Labor. By decision filed October 07, 2019 (A.L.J. Case No.), the Judge overruled the initial determinations.

The Commissioner of Labor appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statement submitted on behalf of the Commissioner.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: PD is a psychotherapy and mental healthcare provider with several locations in Queens, New York. PD solicits clients through its website, which identified the numerous types of therapy approaches offered, insurances accepted, and business hours for each of its locations. The website

further provides the following:

The Center at Western Queens is a community-based facility orientated to serve children, teens, adults, couples, families and groups. With several conveniently located offices throughout the Queens area while progressively working with social workers, primary care physicians, and psychiatrists, our center is committed to providing you with the highest quality therapeutic support. Our Clinical Director, Patricio Destvet, LMHC has continuously provided outstanding services for the culturally diverse communities for over 20 years. Our multilingual licensed mental health professionals have been chosen for their skill, compassion, integrity and dedication in assisting individuals and families with mental and emotional challenges. Our therapists tailor treatment to meet our patients' specific needs in order to improve their quality of lives. Whether you need assistance with depression, anxiety, ADHD/ADD, trauma, or the stress of everyday life, they will provide you with care that is sensitive and responsive to your needs. We also provide services for children and teens facing difficulties at home and/or school and always offer parenting counseling. Some of the different techniques used by our highly dedicated therapists are: Play Therapy for children, Cognitive Behavioral Therapy, and Dynamic Therapy amongst many others. Contact us today to schedule an appointment!

<https://www.centerwesternqueens.com/our-locations/>

Patricio Destvet, the executive and clinical director of PD, is the owner-member of the limited liability company. PD employs numerous administrative staff as acknowledged employees, such as receptionists and secretaries. PD defines itself as a "referral" network or service and classifies all the therapists as independent contractors. Some therapists have their own practices outside of PD and others do not. Some therapists may have their own website listing and advertising that may list PD's office locations and their own offices.

PD has a high turnover of therapists and continually advertises for therapists on the internet, such as, Indeed.com and LinkedIn.com. PD included in the job postings certain requirements, e.g., therapists with specific therapy approaches or therapists who are bilingual in Spanish and English. Potential therapists provided resumes to PD. The director conducted the interviews, sharing the needs of the practice and hearing the desires of the prospective therapists, including their background, credentials, proficiency, and

availability. The director inquired if the therapist had an NPI number (a 10-digit numeric identification number for covered health care providers), which is a Health Insurance Portability and Accountability Act (HIPAA) Administrative Standard that must be used for electronic administrative and financial transactions, including billing.

For some newly licensed therapists, the director provided an explanation of how insurance reimbursement works, e.g., the manner, amount and time expectation of insurance payments. The director set the percentage of the insurance payment retained by PD as its fee. Some therapists negotiated their percentage of the insurance payment.

PD verified that their professional licenses were in good standing with the NYS Department of Education, Office of the Professions, as well as their valid participation with insurance companies. Such verification, together with the requirement to have liability insurance, satisfied the director of any therapist's clean record without conducting a criminal background check. Upon the director's satisfaction, PD engaged therapists without a written contract. When newly licensed therapists do not have an NPI, the director assisted them in becoming approved providers with insurance companies.

PD's staff maintained a database of available therapists with their details, e.g., age, bilingual status, specialty, and office location. The staff arranged which therapists will be in which offices at specific times and maintained that schedule on the office calendar. Patients made appointments by calling PD's office or booking through PD's website. PD's staff answered phones, took messages, and made appointments for patients. The staff referred patients to certain therapists depending on new patients' needs and preferences against the therapists' specialties and languages, verified patients' insurance coverage, provided patients with HIPAA forms to complete, and assisted and interacted with patients as needed. Therapists also scheduled patient appointments themselves.

Upon providing services to a patient, therapists completed the medical records and billing codes. PD's staff prepared and submitted the billing paperwork to a third-party billing company. PD kept and maintained all patient records. The director supervised the clinic's appointments and oversaw the quality of care provided by the therapists, including being available to discuss a patient's specific circumstance. Therapists were expected to let PD know if they will be absent. If therapists become unavailable, they were expected to find their own

coverage or to reschedule their patients. Any patient complaint regarding a therapist was made directly to, or referred to, the NYS Office of the Professions.

Insurance companies contracted with healthcare providers to provide healthcare to those enrolled in plans offered by such insurance companies. As a "network provider" or "in-network provider" for numerous health insurance companies, PD was able to accept numerous patients having an array of health insurance plans. Therapists joined PD to take advantage of the in-network provider status. For services rendered through PD, therapists did not directly bill or collect payments. Therapists did not submit invoices. The billing of an insurance company was done under PD's name, and the insurance payment was made to PD, for the services provided by the therapists under their respective NPIs. PD collected the payments from the insurance companies and from self-pay patients. Based on the agreed upon percentage, PD remitted a portion of the collected payment to the therapists in their personal capacity on the 5th of each month. PD issued IRS 1099 forms to the therapists in their personal capacity. Some newly licensed therapists who had no patient base eventually became established therapists through their relationship with PD.

Pursuant to a complaint, the Department of Labor commenced an audit of PD's books and records. PD gave its accountant a power of attorney and he provided requested records and answered the auditor's inquiries, including information that numerous individuals deemed misclassified as independent contractors were various types of therapists. While excluding payments to the PLLC member, the Department included in the audit as covered employees the individual therapists who received IRS 1099 payments in their personal capacity, which resulted in the pending revised assessment.

OPINION: The evidence establishes that the employer exercised, or reserved the right to exercise, sufficient supervision, direction, or control over therapists to hold employment relationships under the Unemployment Insurance Law. "Where, as here, the work of medical professionals is involved, the pertinent inquiry is whether the purported employer retained overall control over the work performed" (Matter of Williams [Summit Health, Inc.], 146 AD3d 1210 [2017]; see *In re Concourse Ophthalmology Associates, P.C.*, 60 NY2d 734 [1983]), and "no single factor is dispositive" (some internal brackets and citations omitted). *Matter of Millennium Medical Care, P.C.*, 175 AD3d 755 (3d Dept 2019). Here, PD retained overall control over the therapists' services. PD solicited clients by advertising its business, as well as the director's

experience through its website; PD solicited, screened, and maintained a database roster of therapists for its staff to use in matching and scheduling them to patients canvassed by PD's website; the director assisted therapists to obtain requisite credentials to bill insurance companies; PD provided the furnished offices with staff who ensured that patients completed requisite paperwork (e.g., HIPAA and insurance forms); the director supervised the clinics'

appointments and oversaw the quality of care; PD kept and maintained all patient records; PD handled the billing and collection; and PD paid the therapists an amount less than it collected in their personal capacity.

The Court has held that "it is incumbent on the Board to decide like cases the same way or explain the departure". *Matter of Charles A. Field Delivery Service Inc.*, 66 NY2d 516 (1985), rev'g 112 AD2d 505 (3d Dept 1985). See also *Matter of Casey [Larkfield Lottery]*, 140 AD2d 925 (3d Dept 1988). Here, even though PD may not have directly supervised the therapists' performance, this case is like other employment relationships where professionals provided services on the employer's premises. See, *Matter of Salamanca Nursing Home Inc.*, 68 NY2d 901 (1986), aff'g 117 AD2d 903 (3d Dept 1986); *Matter of Myron Goldstein RPT PC*, 61 NY2d 937 (1984), aff'g 90 AD2d 632 (3d Dept 1982); *Matter of Concourse Ophthalmology Assoc.*, 60 NY2d 734 (1983), aff'g 89 AD2d 1047 (3d Dept 1982); *Matter of Stewart (American Institute for Stuttering)*, 137 AD3d 1395 (3d Dept 2016); *Matter of Lustgarten (NY Psychotherapy and Counseling Ctr.)*, 123 AD3d 1212 (3d Dept 2014); *Matter of Sun [Anuthep Benja-Athon MD, PC]*, 27 AD3d 862 (3d Dept 2006); and *Matter of Salamatian [Louis Lasky Memorial Medical & Dental Centers]*, 263 AD2d 748 (3d Dept 1999).

Also, even where screened professionals perform services off-premises at a client site, the Courts have held that the employer exercises sufficient control to create employer-employee relationships. See *Matter of David Gentile Nursing Services*, 65 NY2d 622 (1985); *Matter of Kliman (Genesee Region Home Care Association, Inc., DBA Lifetime Care)*, 141 AD3d 1049 (3d Dept 2016); *Matter of Ryan (La Cruz Radiation Consultants Inc.)*, 138 AD3d 1324 (3d Dept 2016); *Matter of Hoyt (Project Solvers Inc.)*, 256 AD2d 859 (3d Dept 1998); *Matter of Faculty Tutoring Service Inc.*, 244 AD2d 744 (3d Dept 1997); *Matter of Kimberg, DBA Home Therapists Association*, 188 AD2d 781 (3d Dept 1992); and *Matter of Holbrook Speech Services Inc.*, 116 AD2d 863 (3d Dept 1986).

Further, not only does the record establish no investment by the therapists in

PD's business (Matter of Pinti, DBA Federal Ambulance Service, 94 AD2d 833 [3d Dept 1983]), but the therapists had minimal financial risk since they were paid a percentage of their billings rather than a fixed rental rate (Matter of Concourse Ophthalmology Assoc., 60 NY2d 734 [1983]; and Matter of Scinta (ExamOne World Wide Inc.), 113 AD3d 959 [3d Dept 2014]).

We find unpersuasive PD's contention that the included individuals should be deemed business entities like that of a corporation the Department had excluded from the audit. Significantly, the included individuals were not paid in their business capacities but paid in their personal capacities. See Matter of Khamis (Conroy Carriers Inc., ___ AD3d ___, NY Slip Op 07106 (3d Dept December 15, 2022); and Appeal Board No. 596664. PD's other objections, including allegations that the accountant providing incorrect information and the request to subpoena its accountant, are not relevant considering the testimony and evidence of the therapists' services. Under the totality of the circumstances, the therapists were properly determined to be covered employees for purposes of unemployment insurance.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determinations, holding PD Mental Health Counseling of Western Queens PLLC liable for tax contributions in the revised amount of \$28,478.64 for audit period 2015 through 2017 based on unreported payments made to mental health therapists deemed to be in covered employment, is sustained.

The employer is liable with respect to the decided issues.

RANDALL T. DOUGLAS, MEMBER